2008

Caroline Hayes Graydon dba Caroline Hayes Coats v. Peter Coats : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CAROLINE HAYES GRAYDON,
fka CAROLINE HAYES COATS,

Appellee,

vs. Case No. 20080992

PETER COATS,

Appellant.

REPLY BRIEF OF APPELLANT

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Judith Atherton

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Appellant Peter Coats (hereinafter Peter) responds to the Brief of Appellee Carolyn Graydon (hereinafter Caroline) filed June 24, 2009 in the sequence of her brief.

ARGUMENT

POINT I

PETER'S APPEAL IS TIMELY AND COMPLIES WITH THE UTAH RULES OF APPELLATE PROCEDURE.

A. Peter's Appeal of the October 2, 2008 Default Order is Timely.

Caroline argues that the appeal by Peter was untimely since his Notice of Appeal dated November 26, 2008 is more than thirty days after the October 2, 2008 "Minute Entry and Order" of Judge Atherton. Caroline characterizes this Order as a "Default Judgment" and therefore claims that the Notice of Appeal was untimely filed. (Appellee's Brief, pp. 19-20). Such an assertion is patently incorrect.

The Order of Judge Atherton on October 2, 2008 was the entry of a default—not a judgment. The Court specifically stated:

> Therefore, because Respondent has failed to respond to Petitioner's Motion, this Court's review of the pleadings and for cause appearing Petitioner's Motion for Entry of Default is granted. Respondent's Answer is stricken, his Default is hereby entered. (R. 2161-163; *see* Addendum to this Brief).

It is obvious from reading this "Minute Entry and Order" that it is not a judgment from which an appeal can be taken. The Order made no attempt to

disburse property or funds of the parties or to encompass any other matters that would be included in a valid judgment. The Order simply entered the default of Peter and struck his Answer thereby allowing a further proceeding to occur in which a judgment would be taken. "There is an important distinction between a default and a default judgment." Skanchy v. Calcados Ortopesa, 952 P.2d 1071,1076 (Utah 1998).

Rule 55 relating to defaults provides for a two-pronged procedure: the entry of a default and the entry of a default judgment. Clearly, had the Court not entered default on October 2, 2008 any subsequent default judgment would be improper and voidable. P&B Land, Inc. v. Klungervik, 751 P.2d 274 (Utah App. 1988).

Caroline herself recognized that additional evidence would have to be presented to Judge Atherton in order for a valid judgment to occur. On October 6, 2008 (R. 2273-2275) Caroline filed the following document: "Petitioner's Motion for Taking of Petitioner's Testimony in Support of Default Judgment and Entry of Supplemental Decree." Caroline's pleading stated:

> Said motion is based upon the fact that this Court has entered Respondent's default, and stricken Respondent's pleadings. While a bifurcated divorce decree has been entered, which granted Petitioner sole custody of the minor children, no final supplemented decree has been entered. In order for the court to enter a supplemental decree of divorce, this Court may wish to hear limited evidence to permit the fair and equitable settlement of the estate, as prayed for by Petitioner in her Complaint for Divorce. In support of Petitioner's claims against Respondent for contempt, award of attorneys' fees, Petitioner submits a trial brief, herewith, respecting specific relief from this Court.

Moreover, even in Caroline's own Brief she acknowledges that "Peter's default" was entered on October 2, 2008. (Appellee's Brief, p.7). She also notes that at the contempt hearing on October 7, 2008 she was allowed to call witnesses and introduce exhibits in support of the relief requested in her prior motions and in her amended trial brief which had been provided to support her position at the divorce trial. (Appellee's Brief, p. 7). Caroline also noted:

> Further, based upon Caroline's testimony and exhibits and the verified Amended Trial Brief, as well as the totality of the record, and based upon Peter's default, the Court entered Supplemental Findings of Fact and Conclusions of Law and a Supplemental Decree of Divorce signed November 10, 2008 and entered November 12, 2008. (Appellee's Brief, p. 7-8).

Caroline has acknowledged throughout these trial and appellate proceedings that the Judgment in this matter did not occur until November 12, 2008 when the lower court decided the actual division of property and other matters. Caroline has cited no authority that Rule 4 of the Utah Rules of Appellate Procedure requires a party to appeal from the entry of a default prior to the subsequent entry of the judgment based upon such default. There is simply no authority to support her position and the appeal in this matter was timely filed well within the thirty days of the November 12, 2008 judgment.

B. <u>The April 23, 2009 Order Denying Rule 60(b) Relief Has No Bearing Upon this Appeal.</u>

Appellee Caroline asserts that because no appeal was taken by Peter from the April 23, 2009 Order of Judge Atherton denying Rule 60(b) relief that therefore "the issue of Appellant's default is finally resolved and no appeal may be

taken at this time, as the time for appeal has passed." (Appellee's Brief, p 21). This argument is also in error.

After the entry of judgment on November 12, 2008, the newly appointed conservator of Peter elected to file both a direct appeal to this Court and a Rule 60(b) motion to the lower court. As noted in the prior section, the Notice of Appeal was timely since it was within the thirty-day period allowed by Rule 4 of the Utah Rules of Appellate Procedure. The purpose of the present appeal was to preserve all of the substantive issues that occurred during the seven-year disposition of this case for review by this Court.

Simultaneously, the conservator elected to file a Rule 60(b) motion requesting the lower court to provide relief in order that this appeal would not be necessary. Normally, lower court proceedings and appellate court proceedings cannot be done simultaneously. However, this Court in Baker v. Western Surety Co., 757 P.2d 878 (Utah App. 1988) accepted a position adopted by a majority of courts that a trial court has jurisdiction to consider a Rule 60(b) motion while an appeal is pending. The Utah Supreme Court affirmed this position in White v. State, 795 P.2d 648 (Utah 1990). This Court has recognized the appropriateness of filing these two simultaneous actions in divorce proceedings. Nigohosian v. Nigohosian, 204 Utah App. 116 (April 15, 2004). This Court and the Utah Supreme Court have approved this dual track system in order to allow the lower court to expeditiously correct errors before the litigants are require to expend time and resources in a prolonged appeal.

In this case, for example, the desired effect previously occurred. In January of 2004 Judge Lewis entered a default against Peter and an amended judgment in August. In September of 2004 an appeal was taken to this Court in Case No. 20040784. Simultaneously, a Rule 60(b) motion was filed before Judge Lewis requesting that her prior default judgment be set aside and that the matter be allowed to proceed on to trial. On March 3, 2005 Judge Lewis granted the Rule 60(b) motion and set aside the prior orders. The parties stipulated to dismissal of the appeal to this Court and the litigation continued without appellate intervention.

Unfortunately, Judge Atherton did not find merit in Peter's Rule 60(b) motion and denied it. Although such denial is an appealable order, there is no reason for Peter to appeal such order because of the narrow appellate review which applies to such order. As noted by this Court:

> Even when an order on a Rule 60(b) motion is appealable, the appeal is narrow in scope. An appeal of a Rule 60(b) order addresses only the propriety of the denial or grant of relief. The appeal does not, at least in most cases, reach the merits of the underlying judgment from which relief was sought. Appellate review of Rule 60(b) orders must be narrowed in this matter less Rule 60(b) becomes a substitute for timely appeals. *An inquiry into the merits of the underlying judgment or order must be the subject of a direct appeal from the judgment or order.* Franklin Covey Client Sales, Inc. v. Melvin, 2 P.3d 451, 460 (Utah App. 2000) (emphasis added).

In addition, the Franklin Covey case consisted of categorically removed legal error from the realm of Rule 60(b) review. The Utah Supreme Court endorsed this reasoning in Fisher v. Bybee, 104 P.3d 1198 (Utah 2004).

Thus, the law is clear that an appeal from the Rule 60(b) denial cannot challenge the underlying judgment itself and that substantive issues regarding the judgment are beyond the scope of the Rule 60(b) appeal. Moreover, a litigant must walk a dangerous path in deciding which issues "involve legal errors" and which issues do not. An incorrect characterization can easily result in a Rule 60(b) motion being denied.

In Christensen v. Hammon, 205 Ut. App. 19 (Utah App. 01/21/2005) a default judgment was entered against the appellants. The litigants made the fatal mistake of failing to directly appeal from the judgment itself and instead relied upon a Rule 60(b) motion. This Court stated:

> In their Notice of Appeal, the Hammons identified both the judgment and the denial of their motion to set aside the judgment as orders from which the appeal was taken. However, only the appeal from the denial of the motion to set aside is properly before this Court. The Hammons did not file a timely notice of appeal from the entry of the judgment itself. *See* Utah R. App. T. 4(a) requiring notice of appeal to be filed within thirty days of the order appealed. Thus, this Court lacks jurisdiction to consider an appeal from the judgment.
>
> * * *
>
> On appeal, the Hammons have stated issues that are substantive challenges to the judgment itself or other underlying orders. These issues are beyond the scope of review of the trial court's denial of their Rule 60(b) motion to set aside the judgment. *Id.* at pp. 19-20.

In summary, all of the issues raised in Appellant's opening Brief are properly before this Court on this direct appeal, including the propriety of defaulting Peter, and the failure to appeal the Rule 60(b) denial has no effect on this appeal.

C. The Notice of Appeal Filed by Peter Complies with Rule 3 of the Utah Rules of Appellate Procedure and Properly Preserves All the Issues Being Raised in This Appeal.

Caroline contends that the Notice of Appeal filed by Peter on November 26, 2008 (incorrectly characterized by Caroline as December 26, 2008) is defective on its face. (Appellee's Brief, pp. 21-22).

Caroline first argues that the Notice is defective because it does not appeal from the April 23, 2009 Order of Judge Atherton denying the Rule 60(b) relief (which occurred some five months *after* the Notice of Appeal was filed by Peter in November of 2008). As noted in the prior section, Peter chose to file a direct appeal from the comprehensive judgment of November 12, 2008 and did so within the appropriate thirty-day time frame. As also noted in the prior section, he elected not to file an appeal from the Rule 60(b) order subsequently entered. Thus, the Rule 60(b) decision has no effect whatsoever upon the timeliness of the Notice of Appeal filed from the November 12, 2008 Judgment.

Caroline next argues that the Notice is defective because it omits the Default Order of October 2, 2008 from the listed events.

The Notice of Appeal filed by Peter stated the following:

> Notice is hereby given that Respondent and Appellant Peter Coats, by and through his conservator, Jonathan M. Coats, through counsel, Craig S. Cook, appeals to the Utah Court of Appeals the final Judgment of the Honorable Judith S. Atherton entered in this matter on November 12, 2008.
>
> The appeal is taken from the entire judgment including those proceedings of August 22, 2002, October 3, 2002, October 7, 2008 and October 28, 2008. (R. 2375).

Clearly, Peter appealed from the "Final Judgment" entered on November 12, 2008 as stated in the first paragraph. As additional clarification, the Notice stated that the appeal was taken from the "entire judgment" including certain proceedings therein listed. Peter intended to list October 2, 2008 as one of these proceedings but a typographical error occurred making it October 28.

In any event, the law is clear that when appealing from an entire final judgment, it is not necessary to specify each interlocutory order from which the appellant seeks review. Scudder v. Kennecott Copper Corp., 886 P.2d 48 (Utah 1994). *See also,* UPC, Inc. v. ROA General Inc. 990 P.2d 945 (Utah App. 1999).

It was not necessary for Peter to list any dates of the interlocutory proceedings that affected the judgment of November 12, 2008 and therefore the omission of the correct October 2, 2008 date of the entry of default is irrelevant to preserving this issue for appeal.

D. Appellant's Brief is Not Defective and Complies With The Appellate Rules of Procedure.

Caroline contends that Peter has filed to comply with two briefing requirements: first, a citation to the record showing an issue was preserved in the trial court in the Statement of Issues; second, no citation to the record in the Statement of Facts. (Appellee's Brief, pp. 22-25). Again, Appellee is mistaken.

Appellant has raised four issues in this appeal: (1) whether the lower court improperly voided a settlement reached by the parties themselves; (2) whether the lower court erred in defaulting Peter; (3) whether the lower court erred in

awarding damages against the clear weight of the evidence; and (4) whether the lower court erred in awarding attorneys fees when there was no evidence that such fees were needed and reasonable.

All of these issues are properly preserved in this appeal by the various trial court orders relating to them. No action was required by Peter in order to preserve these issues for appeal. .

This is not a case, for example, where jury instructions or trial evidence is being contested and where timely objections have to be made. Here, for example, the entry of the Default Judgment including various findings of damages require no additional "preservation" on the part of Peter in order to appeal these awards. Thus, the issues in this case do not lend themselves to the citation rule contained in Rule 24(5)(a) of the Utah Rules of Appellate Procedure.

Appellant in his Brief chose to use his "Statement of Facts" to describe the course of litigation which occurred in this seven-year odyssey. (Appellant's Brief, pp. 2-8). All of the matters contained therein are undisputed judicial events which narrate the history of this litigation. They are no different than the history given by Caroline in her "Statement of the Case" (Appellee's Brief, pp. 4-8) which also lists the various judicial events which occurred. It should be noted that both statements of judicial history of Appellant and Appellee contain no record references since they are not needed in the undisputed history of this litigation.

Perhaps, Peter should have chosen to use the heading "Statement of the Case" instead of "Statement of Facts" to narrate this judicial history. In any

event, the true "Statement of Facts" involving items of dispute is found in each of the legal points raised in Appellant's Brief. (*See* Statement of Applicable Facts, pp. 10-15;. 22-28;. 33-34; 35-41; 42-43; and 44-46, Appellant's Brief). These "facts" are well documented with citations to the record, hearing transcripts, and to reproduction of documents contained in Appellant's Appendix.

Appellee Caroline has chosen to place the facts relating to all issues raised by Peter in one portion of the Brief (Appellee's Brief, pp. 9-19) as opposed to Peter's choice to place the applicable statement of facts with each issue of law as noted *supra.* Peter believes that this division allows the facts to be more focused as to each legal issue rather than to be lost in a long dissertation of facts relating to many issues.

Certainly, none of the cases cited by Caroline prohibit a party from focusing facts as to each issue as long as the basic citation and relevancy requirements are met. Peter has complied with the Rules of Appellate Procedure in the preparation of his brief.

D.[sic] Peter's Appeal of the Order of October 3, 2002 is Timely.

Caroline contends that present Rules of Civil Procedure and former Rules of Judicial Administration 6-401(4) preclude Peter from raising the validity of Judge Lewis' Order striking down the Settlement Agreement reached by the parties. (Appellee's Brief, pp. 25-26). Caroline argues that because Peter's attorney did not object to the Commissioner recommendation as provided in these

rules that he is unable to appeal from the order entered by the trial court pursuant to such recommendation.

Caroline has cited no authority for this proposition. There is nothing in the rules which state that the order of the court is not subject to appellate review as is any interlocutory order throughout a litigated proceeding. Had the hearing been held before Judge Lewis initially and the order striking the Settlement Agreement entered, there is no doubt that such order would be appealable. The mere fact that the Commissioner initially held the hearing and Judge Lewis entered the Findings without objection does not change the validity of her Order or make it any less final for purposes of appeal.

While it is clear that failure to object to the Commissioner's Order precludes any further argument to the trial court about the merits of the prior order, there is nothing in the past or present rules that make the trial court the final appellate authority as, for example, when an appeal is taken from a Justice Court to a District Court.

Caroline states, "The recommendation then became the Order of the Court. The Order of October 3, 2002 became and remained the law of the case at the date of Peter's default." (Appellee's Brief, p. 26). This is correct and as such is a valid interlocutory order that can now be appealed after the final judgment was entered.

POINT II

THE APRIL 16, 2002 AGREEMENT WAS A LEGALLY VALID CONTRACT OF SETTLEMENT BETWEEN THE PARTIES THAT SHOULD HAVE BEEN GIVEN EFFECT IN 2002 THEREBY AFFECTING ALL SUBSEQUENT LITIGATION.

Caroline's version of the facts relating to the April 16, 2002 Agreement is contained in her "Statement of Facts" (Appellee's Brief, pp. 9-13). Peter believes that several of these statements are incorrect. For example, Caroline contends that Peter's counsel at the time of the hearing acknowledged that there were several necessary terms missing from the Settlement Agreement. (Appellee's Brief, p. 11). Peter does not believe the reference citation supports this contention nor can he find anything in the hearing transcript to support it.

While Caroline argues that Peter virtually did nothing during the seven years to assert the validity of the April 2002 agreement (Appellee's Brief, p. 11) this statement is contrary to the statement made by Caroline's counsel during the October 7, 2008 evidentiary hearing. Ms. Williams stated to the Court:

> Part of the problem that has arisen in this case *time and time again* is that Mr. Coats is *fixated on the belief* that there is some prenuptial—or postnuptial agreement or agreement that's been reached by the parties. This has been resolved back in 2002, and *he keeps bringing it up*. It is the law of the case. *He won't give up*. We need Your Honor's assistance in making him understand that there are no agreements. That's why we had a three-day trial schedule because there were no stipulations, postnuptial agreements or anything else that was enforceable. (Tr. Oct. 7, 2008, p. 111)(emphasis added).

The colloquy between the Court and Peter concerning his assertion concerning the Constitution of the United States and Utah (citation should be page 116 and 117) has no relevance in this appeal except to make Peter look badly. In essence, Peter as a *pro se* litigant was attempting to assert the Settlement Agreement and, or course, could not do so against skilled counsel retained by Caroline.

In any event, Caroline's silence in her brief has again acknowledged that she has never paid to Peter the $9,920 ordered by the Commissioner and Court. Instead, she states that "the payment by Caroline to Peter of $9,920 was not a stated condition precedent in the October 3, 2002 Order to the lower court findings that all prior agreements between the parties was void and without legal effect." (Appellee's Brief, p. 13).

To the contrary, the Commissioner noted on several instances that Peter had "detrimentally relied" upon his belief that a Settlement Agreement had been reached and, as quoted in Peter's prior Brief, ordered the return of the funds immediately and stated, "You can't have it both ways and so you give him back the money immediately." (Appellant's Brief, p. 21).

In the Argument portion of her Brief, (Appellee's Brief, pp. 26-29) several statements are also erroneous. For example, Caroline states, "In the instant case, the alleged Settlement Agreement was never reduced to writing, a point upon which both parties fully agree." (Appellee's Brief, p. 27). Again, to the contrary,

the "Decree of Divorce" prepared by Caroline was definitely in writing as evidenced on pages 48 and 49 of Appellant's opening Appendix.

She further states, "It as not signed by counsel for either party." (Appellee's Brief, p. 27). Peter at that point had no counsel since he had dismissed her in reliance upon the Agreement being presented to Judge Lewis by Caroline's attorney.

The reliance by the Commissioner, the trial court, and Caroline upon then existing UCJA 4-504 completely distorts the impact of the Settlement Agreement. Had Caroline chosen to prepare a settlement agreement similar in form to the one she prepared on June 16, 1998 (*see* Appellant's Opening Appendix, pp. 44-45) the question as to compliance with Rule 4-504 would never have come up. In essence, instead of looking upon the agreement between Caroline and Peter as a valid Settlement Agreement with consideration, the Commissioner and the Court viewed it as a final Order subject to the rules necessary for valid entry. It is the substance of the Agreement—not the form, which should have controlled.

Had a Settlement Agreement been prepared as had been done in the past by Caroline, it would have been up to her attorney to properly prepare an order in the correct format of UCJA 4-504. However, this order would only be a reflection of the prior valid Settlement Agreement reached by the parties. Thus, the Commissioner and the court erred by failing to look at the actual contractual Agreement reached by the parties and instead upon the form chosen by Caroline in which to implement the Agreement.

Caroline attempts to distinguish the Goodmansen case (Appellee's Brief, pp. 27-28) on the basis that counsel for the parties were involved in reaching an agreement rather than the parties themselves. Certainly, there is nothing in that case that states that litigants are precluded from making their own agreements without their attorneys in order to have a valid settlement. Also, Caroline states, "Ther was no meeting of the minds resulting in a full settlement agreement." (Appellee's Brief, p. 28). Again, the parties agreed to all of the elements they thought were relevant to a settlement agreement and put it in writing. Certainly, their intent as to those items should have been given great deference by the trial court in making any divorce decision.

The remainder of Caroline's arguments contained in the legal portion of the brief have previously been addressed. (Appellee's Brief, pp. 28-29). For this reason, therefore, Peter respectfully asks that this Court remand this matter for an evidentiary hearing to determine the validity of the Settlement Agreement and the effect it should be given.

POINT III

THE LOWER COURT ERRED IN DEFAULTING APPELLANT PETER WHEN THE RECORD SHOWS HE WAS ACTING IN GOOD FAITH TO COMPLY WITH DISCOVERY.

Caroline misunderstands the scope of Peter's appeal concerning the entry of the default judgment before this Court. Peter is not relying upon Rule 60(b) of the Utah Rules of Civil Procedure in asking that this Court set aside the Default

Judgment based on mistake, inadvertence, surprise or excusable neglect. (Appellee's Brief, pp. 32-33). All the cases cited by Caroline involve appeals from orders of trial courts denying Rule 60(b) relief. Thus, all of these cases are irrelevant to this appeal.

In Utah Dept. of Transportation v. Osguthorpe, 892 P.2d 4 (Utah 1995) a default judgment was entered in a condemnation case. On appeal, the Utah Supreme Court considered two distinct contentions: first, whether the lower court erred in striking the answer and entering the default of the appellant pursuant to Rule 37, Utah Rules of Civil Procedure relating to failure to provide discovery; and second, whether the lower court erred in failing to grant a Rule 60(b) motion to set aside the default. While the standards of discretion are similar there are nevertheless distinct differences in the former over the latter.

Before a court can grant a default for discovery failure there must be a showing of "willfulness, bad faith, or fault on the part of the non-complying party." First Federal Savings & Loan Assn. v. Schamanek, 684 P.2d 1257 (Utah 1984).

In the Osguthorpe case, the court noted that Osguthorpe was in contact with legal counsel throughout and at the end of the process and completely failed to make any effort either *pro se* or with an attorney. The court noted, "This is not a case where a confused and unassisted layman was thrown out of the courthouse simply for missing a discovery deadline." 892 P.2d at 11.

It would serve no useful purpose to reargue the factual evidence in this case relating to the efforts of Peter as to the discovery requests. There is no question that neither he nor his attorneys formally filed the correct discovery certificates in the record to indicate discovery compliance. However, the trial court in entering the default did not consider Peter's good faith belief that he had in fact produced the documents requested in most of the discovery demands. As noted in Appellant's opening Brief (p. 32) the Court seemed unaware of the September 5, 2008 document filed by Peter specifically stating that he had answered all the previous interrogatories and requests as well as the conversation he had had with Caroline's attorney to the same effect.

It was not until the hearing of October 7, 2008, which occurred after the entry of the default, that Peter was allowed to testify to his belief that he had supplied many of the discovery requests. As he noted, "If we're given a 15-minute break I will find it in the court records." (Tr. Oct. 7, 2008, p. 153-54).

There is certainly no doubt that the lower court has broad discretion under Rule 37, Utah Rules of Civil Procedure in ordering a default and a default judgment for failure to comply with discovery. However, the specific standard of "willfulness, bad faith, or fault" must be found before such an extreme remedy can be imposed. It is respectfully requested that this matter be remanded to the lower court for an evidentiary hearing to determine what discovery requests were satisfied in spite of the lack of formal certification in the record. Certainly, competent trial counsel for Peter can quickly present any evidence in his defense

that would negate against a default being entered or will be unable to present such evidence thereby supporting the default entry.

POINT IV

THE FINDINGS AND JUDGMENT OF THE LOWER COURT RELATING TO DAMAGES FROM THE SALE OF THE "NORTH PARCEL" ARE CLEARLY ERRONEOUS AND ARE AGAINST THE CLEAR WEIGHT OF THE EVIDENCE.

Caroline relies upon the case of Skanchy v. Calcados Ortopesa, 952 P.2d 1071 (Utah 1998) in support of her claim that there is sufficient evidence to justify an award of over $500,000 to her. (Appellee's Brief p.35). In this case the Utah Supreme Court stated the following:

> To enter a default judgment for unliquidated damages, a judge must review the complaint; determine whether the allegations state a valid claim for relief, and award damages in an amount that is supported by some valid evidence. In other words, the allegations in the complaint are not a sufficient basis for awarding unliquidated damages. *See* Larsen v. Colinna, 684 P.2d 52, 56 (Utah 1984). That usually means a hearing must be held so that the plaintiff can provide evidentiary support for the award of damages. *Id.* at 1076.

Caroline's claim that Peter allegedly did not respond to various discovery requests or was otherwise not helpful in the divorce does not equate into sufficient evidence to show that he prevented the sale of the north property which resulted in a loss of over $500,000 to Caroline. (Appellee's Brief p. 35).

As noted by Caroline, the evidence before the Court was that there was an offer to buy the property for $5,200,000, the amount of actual proceeds from the foreclosure of the property was less than this and that the attorney affidavit of Bryce Panzer stated that, "Although there were at least two viable offers on the north parcel, Peter Coats would not proceed to close either of them because he would not agree to Caroline Graydon's condition that the proceeds of the sale of the property be escrowed pending a resolution by the divorce court as to the interest of the parties." (Appellee's Brief, pp. 36-37).

Thus, Caroline has offered no additional evidence other than the Panzer affidavit from that which was proffered by Peter in his opening Brief (pp. 33-34; 35-41).

The affidavit of Mr. Panzer was not offered during the October 7 hearing in support of damages for the failed sale. Instead, it was offered in an attempt to have the lower court award attorneys' fees of some $105,000 to Caroline for lawsuits not involving the actual divorce. The lower court declined to pay these fees to Mr. Panzer but "reserved" the issue. (Finding No. 24, R. 2337; Appellant's opening Appendix, pp. 15-16).

The statement contained in paragraph (e) of Mr. Panzer's affidavit (*see* p. 4 of Appellee's Addendum) is insufficient as a matter of law to support the claim that Peter intentionally prevented the sale of the property to Mr. Hagen. The statement by Mr. Panzer does not identify this particular sale and in fact states there were "at least two very viable offers" which may not even include the Hagen

proposal. This vague opinion statement contained in an attorney affidavit is certainly insufficient evidence to support the claim that Peter intentionally prevented a sale which would have brought him personally an additional $500,000.

There is simply no competent evidence in the record either in the form of testimony or documents to support this award.

Contrary to Caroline's assertion, it is not required in a default proceeding that the defaulting party rebut the evidence of the prevailing party. (Appellee's Brief, p. 37). In most instances, the defaulting party is not even present. The law is clear that the prevailing party themselves must produce sufficient evidence to justify a default judgment award. Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950 (Utah App. 1989).

Therefore, the award of over $500,000 to Caroline should be reversed as a matter of law.

POINT V

THE LOWER COURT ERRED IN IMPOSING A JUDGMENT AGAINST APPELLANT PETER IN THE AMOUNT OF $240,220 FOR APPELLEE CAROLINE'S ATTORNEYS FEES WHERE THERE IS NO EVIDENCE THAT SUCH FEES ARE BASED ON NEED AND REASONABLENESS.

Caroline focuses her response, as to the appropriateness of over $240,000 of attorneys fees, to the issue of "reasonableness." (Appellee's Brief, pp. 37-40). She has presented no additional evidence from that marshaled by Appellant in his

opening Brief. (Appellant's Brief, pp. 44-48). Certainly, Peter has no dispute with the legal standards enunciated in determining whether a lawyer's fee is reasonable under the circumstances. (Appellee's Brief, pp. 39-40). Peter would welcome an opportunity to conduct an evidentiary hearing of the various lawyers and their fees in accordance with these principles and standards.

However, and more importantly, **Appellee has failed to present any additional evidence in support of her need for attorneys' fees**. Caroline makes no mention in her brief of any evidence relating to her financial situation requiring that these large fees be paid.

The lower court did not enter any specific finding as to Caroline's need. (*See* Appellant's opening Brief, pp. 42-43). Apparently, Caroline is unable to cite any evidence in the record to justify this need. This is not surprising since she received over $900,000 from the sale of the north parcel together with a marital home worth over $400,000.

Because Utah law requires that an award must be based on the evidence of the financial need of the receiving spouse, the failure to meet this essential element is fatal to the $240,000 award.

This award should be vacated or, in the alternative, an evidentiary hearing should be held regarding the reasonableness of the fees and the need of Caroline.

POINT VI

ATTORNEYS' FEES ON APPEAL SHOULD BE AWARDED TO THE PREVAILING PARTY.

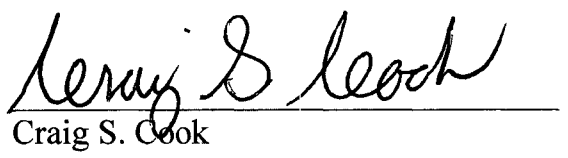
Peter acknowledges that the prevailing party in a divorce appeal may receive attorneys' fees if the legal criteria are met. Of course, Peter would request that such an award be considered in his favor should he be the prevailing party based on the totality of the appeal.

CONCLUSION

The procedural arguments raised by Caroline concerning this appeal are without merit. The four issues validly raised by Peter have been adequately briefed by both parties and are now ready for decision.

Peter respectfully requests that he be granted appropriate relief as to each of these four issues.

DATED this 28th day of July, 2009.



Craig S. Cook
Attorney for Respondent-Appellant

MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing Reply Brief to Kellie F. Williams, Corporon & Williams, Attorney for Appellee, 405 South Main Street, Suite 700, Salt Lake City, Utah 84111 this 28th day of July, 2009

Craig S. Cook

A D D E N D U M

IN THE THIRD DISTRICT COURT

OF SALT LAKE COUNTY, STATE OF UTAH

Caroline Coats,	:	MINUTE ENTRY AND ORDER
Petitioner,	:	
vs.	:	CASE NO. 014902286
Peter Coats,	:	
Respondent.		

This matter is before the Court on Petitioner's Motion for Entry of Default, filed September 15, 2008 and properly served on the Respondent. This matter came before the Court, the Honorable Michelle Blomquist, for hearing on August 28, 2008. At that time the Commissioner recommended the granting of Petitioner's Motion to Compel Discovery responses, the Commissioner having found that Respondent previously had not responded to any discovery request. The Commissioner ordered that all previously propounded interrogatories and requests for production of documents be answered by September 5, 2008 at 5:00 p.m. The Commissioner's recommendation is an order of this Court until vacated by a Judge. This Court signed the Order September 26, 2008.

Petitioner alleges that Respondent failed to comply with the Order on the Motion to Compel. Respondent has failed to respond to Petitioner's Motion for Entry of Default, and this Court has no other pleadings or other response confirming the submission of discovery to Petitioner.

Therefore, because Respondent has failed to respond to Petitioner's Motion , this Court's review of the pleadings and for good cause appearing, Petitioner's Motion for Entry of Default is granted. Respondent's answer is stricken, his default is hereby entered.

Based on the Court's ruling and the entry of Respondent's default, the trial is stricken. The Court will address the certified contempt issues on Tuesday, October 7, 2008 at 9:00 a.m.

Dated this 2 day of Oct -, 2008.

Judge Judi[illegible]

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

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